



## **FACTUAL HISTORY**

On June 2, 1997 appellant, then a 40-year-old clerk working modified duty for three days a week, filed an occupational disease claim alleging that he injured his back that day. On August 20, 1997 the Office accepted that he sustained an employment-related low back strain under Office file number 010347830. He received compensation for 24 hours per week at the augmented 3/4 percent rate. Under Office file number 010340284, the Office had accepted that appellant sustained a right shoulder injury and acute cervical strain, for which he received wage-loss compensation for 16 hours per week at the 3/4 percent augmented rate.<sup>1</sup>

On separate Office EN1032 forms signed by appellant on November 29, 2002 he indicated that he was married and on separate EN1032 forms signed on November 15, 2003, he indicated that he was no longer married. He claimed a grandson, Dylan DeCosta, as a dependent. The record indicates that appellant was divorced on October 1, 2003.<sup>2</sup> By letter dated April 1, 2004, referencing both file numbers, the Office informed appellant that his compensation would be adjusted to the 2/3 rate effective April 18, 2004. A benefit statement for file number 010340284 indicates that, for the period April 18 to May 15, 2004, appellant continued to be paid at the 3/4 rate. Office computer printouts indicate that, beginning May 16, 2004, he was compensated at the statutory 2/3 rate under both file numbers with net compensation was \$689.94 under file number 010340284 and \$1,511.00 under file number 010347830.

On June 7, 2004 under file number 010340284, the Office issued a preliminary determination that appellant was at fault in the creation of an overpayment in the amount of \$1,496.71 for the period October 1, 2003 through May 15, 2004, because he knew or should have known that he was not entitled to receive compensation at the augmented 3/4 rate after he was divorced. On June 8, 2004, under file number 010347830, the case at hand, the Office issued a preliminary determination that appellant was not at fault in the creation of an overpayment in compensation in the amount of \$1,522.71 for the same period October 1, 2003 through May 15, 2004, finding that the overpayment was created because appellant continued to receive compensation at the augmented rate after his divorce. Office computer printouts indicate that, under the latter file number, for the period October 1, 2003 through May 15, 2004, appellant received \$13,696.29 in compensation at the augmented 3/4 rate when he should have received \$12,173.58 at the 2/3 rate, creating an overpayment in compensation in the amount of \$1,522.71.

On June 15, 2004 appellant submitted financial information and an overpayment questionnaire, noting that it applied to both Office file numbers. On two Office forms with the separate file numbers typed in for identification, he requested waiver and a telephone conference. This information, however, was only associated with Office file number 010340284.

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<sup>1</sup> A Postal Inspection Service report dated March 1, 2000 indicates that at that time appellant was receiving separate compensation checks of \$1,222.00 under file number 010340284 and \$1,518.00 under file number 010347830. An overpayment in compensation was found but waived on April 7, 2000.

<sup>2</sup> The record does not contain a divorce decree. Appellant submitted information regarding a contempt hearing dated January 16, 2004, regarding alimony and custody matters, which seemed to indicate that he owed alimony to his former wife from August 1, 2003.

By decision dated November 8, 2004, under file number 010347830, the Office finalized the determination that an overpayment in compensation in the amount of \$1,522.71 had been created. The Office found appellant not at fault but noted that, as he had failed to respond to the June 8, 2004 preliminary determination, they could not determine waiver and found that the overpayment would be repaid by withholding \$75.00 from his periodic compensation.

**LEGAL PRECEDENT -- ISSUE 1**

Section 8129(a) of the Federal Employees' Compensation Act<sup>3</sup> provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”<sup>4</sup>

The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent for a total of 75 percent of monthly pay.<sup>5</sup>

**ANALYSIS -- ISSUE 1**

The Board finds that an overpayment in compensation has been created. On Office EN1032 forms dated November 29, 2002, appellant indicated that he was married, but on EN1032 forms, signed by him on November 15, 2003, he indicated that he was no longer married. The record indicates that, for the period beginning October 1, 2003 through May 15, 2004, appellant continued to receive compensation at the augmented 3/4 rate under file number 010347830. An overpayment in compensation was thus created.<sup>6</sup>

The Board, however, finds this case is not in posture for decision regarding the amount of the overpayment as there is nothing definite in the record regarding the date appellant's divorce became final. While the record contains a note appended to an Office form indicating that appellant's divorce was final on October 1, 2003 the note is merely initialed and does not explain the source of the information. Appellant provided some information regarding a contempt hearing that seemed to indicate that he was divorced in August 2003. The case will therefore be remanded to determine the date appellant's divorce became final so that the amount of the overpayment can be determined.

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> 5 U.S.C. § 8129.

<sup>5</sup> 5 U.S.C. § 8110(b).

<sup>6</sup> *Id.*

Appellant also contended that his grandson Dylan continued to be a dependent. A “grandchild” is not among the categories of persons included in the term “child” under the Act.<sup>7</sup> Section 8110 of the Act defines the class of persons who qualify as “dependents” and thereby come within the scope of the Act for purposes of augmented compensation. This section makes provision that only a member of the class of children specifically defined as a “child” of the injured employee will entitle the latter to augmented compensation for dependents.<sup>8</sup> Appellant would therefore not be entitled to augmented compensation for his grandson Dylan.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of the Act provides that an overpayment in compensation shall be recovered by the Office unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”<sup>9</sup>

Section 10.433(a) of the Office’s regulations provides that the Office “may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.”<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

The Board also find this case is not in posture for decision regarding waiver. The Office found that appellant was not at fault in the creation of the overpayment in compensation in the amount of \$1,522.71, under file number 010347830, but denied waiver because he failed to submit requested financial information.<sup>11</sup> In the case *William A. Couch*,<sup>12</sup> the Board held that when adjudicating a claim, the Office is obligated to consider all relevant evidence properly submitted by a claimant and received by the Office before the final decision is issued. In this case, on June 15, 2004 prior to the issuance of the final overpayment decision on November 8, 2004 appellant submitted financial information and an overpayment questionnaire and requested a telephone conference regarding the preliminary overpayment determinations in this case, found under Office file number 010347830 and that found under file number 010340284. The Office, however, did not associate this evidence with file number 010347830, the case at hand and merely associated it with file number 010340284. Thus, the case must be remanded for the

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<sup>7</sup> See *supra* note 3.

<sup>8</sup> 5 U.S.C. § 8110; *Barbara J. Hill*, 50 ECAB 358 (1999).

<sup>9</sup> See *supra* note 4.

<sup>10</sup> 20 C.F.R. § 10.433; see *Sinclair L. Taylor*, 52 ECAB 227 (2001); see also 20 C.F.R. § 10.430.

<sup>11</sup> The Board notes that, in making a preliminary finding that an overpayment in the amount of \$1,496.71, the Office found appellant to be at fault. The Board does not have jurisdiction over this preliminary decision, however, as its jurisdiction is limited to

<sup>12</sup> 41 ECAB 548 (1990).

Office to consider the information he submitted regarding waiver, to be followed by an appropriate decision.<sup>13</sup>

Finally, the Board finds that the issue regarding recovery of the overpayment is moot until the Office issues a decision regarding the amount of overpayment and determines whether waiver applies in this case.

**CONCLUSION**

The Board finds that the Office properly found that an overpayment in compensation was created but did not fully explain how it determined the date appellant's divorce became final such that a determination could be made regarding when he was longer entitled to augmented compensation and thus determine the amount of the overpayment. The Office also failed to associate appellant's timely submitted financial information with the case record. The case must therefore be remanded to the Office to determine the amount of the overpayment and to determine appellant's eligibility for waiver.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 8, 2004 be vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: September 30, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> *Id.*